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78-1743

No.

In the Supreme Court of the United States

October Term, 1978

RICHARD J. VAUGHN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JEROLD S. SOLOVY
JOSEPH G. BISCEGLIA
Attorneys for Petitioner
Richard J. Vaughn

Of Counsel:
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

TABLE OF CONTENTS

PAGE

Opinions below 1

Jurisdiction 2

Questions presented 2

Relevant statutory provisions 2

Statement of the case 3

Reasons for granting the writ 5

I. There is a conflict among the Circuits and among State Courts as to whether *Chadwick* should be applied "retroactively" to searches occurring prior to the date of that decision 5

II. The decision below raises significant and recurring problems concerning the retroactive application of all future Supreme Court search and seizure decisions 8

1. The decision below, and the decisions on which it relies, sanction police reliance on aberrant judicial authority in conducting searches, and result in a bar to retroactive application of any new Supreme Court search and seizure decision 8

2. Based on the reasoning of decisions denying retroactivity to *Chadwick*, a Supreme Court decision may be retroactive in one circuit and not in another 11

III. Denial of application of *Chadwick* to the facts of this case is unjustified under any standard 11

PAGE

Conclusion 13

Appendix 1 ..... App. 1

Appendix 2 ..... App. 3

Appendix 3 ..... App. 10

TABLE OF AUTHORITIES CITED

Cases

Almeida-Sanchez v. United States, 413 U.S. 266 (1973) 8, 9

Bowen v. United States, 422 U.S. 916 (1975) 9

Bradley v. Cowan, 561 F.2d 1213 (6th Cir. 1977) 7

People v. Crawl, 401 Mich. 1, 257 N.W.2d 86 (1977) 8

People v. DeSantis, 46 N.Y.2d 82, 412 N.Y.S.2d 838 (1978) 8

People v. Hamilton, 74 Ill.2d 457, 386 N.E.2d 53 (1979), *aff'g* 56 Ill.App.3d 196, 371 N.E.2d 1234 (1978) 7, 8

Rodriquez v. State, 91 N.M. 700, 580 P.2d 126 (1978) .. 8

Sanders v. State, 262 Ark. 595, 559 S.W.2d 704 (1977), *cert. granted sub nom. Arkansas* v. *Sanders*, ... U.S. ..... (1978) (No. 77-1497) 7

Shingleton v. State, 39 Md.App. 527, 387 A.2d 1134 (1978) 7

State v. Conti, 573 S.W.2d 95 (Mo.App. 1978) 7

State v. Dean, 2 Kan.App.2d 64, 574 P.2d 572 (1978) .. 8

State v. Kaiser, 91 N.M. 611, 577 P.2d 1257 (Ct. App. 1978) 7

PAGE

State v. Parker, 153 N.J. Super. 481, 380 A.2d 291 (1977) 8

State v. Walker, 119 Ariz. 121, 579 P.2d 1091 (1978) 8

United States v. Berry, 571 F.2d 2 (7th Cir. 1978), *cert. denied*, ... U.S. ....., 99 S.Ct. 129 (1978) 5, 12

United States v. Chadwick, 433 U.S. 1 (1977), *aff'g* 532 F.2d 773 (1st Cir. 1976) 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13

United States v. Colbert, 454 F.2d 801 (5th Cir. 1972), *rev'd en banc on other grounds*, 474 F.2d 174 (1973) 10

United States v. Diggs, 569 F.2d 1264 (3d Cir. 1977) 7

United States v. Foster, 584 F.2d 997 (D.C.Cir. 1978), *cert. denied*, ... U.S. ....., 99 S.Ct. 620 (1978) 7

United States v. Garay, 477 F.2d 1306 (5th Cir. 1973) 10, 12

United States v. Lonabaugh, 494 F.2d 1257 (5th Cir. 1973) 10, 12

United States v. Martin, 562 F.2d 673 (D.C.Cir. 1977) 10, 12

United States v. Mehciz, 437 F.2d 145 (9th Cir. 1971) 10

United States v. Miller, 589 F.2d 1117 (1st Cir. 1978) 7

United States v. Montgomery, 558 F.2d 311 (5th Cir. 1977) 5, 12

United States v. Ochs, No. 78-1163 (2d Cir., Mar. 13, 1979) 6

United States v. Ortiz, 422 U.S. 891 (1975) 9

United States v. Peltier, 422 U.S. 531 (1975) 5, 8, 9, 11, 13

United States v. Reda, 563 F.2d 510 (2d Cir. 1977), *cert. denied*, 435 U.S. 973 (1978) 5, 6, 12

PAGE

United States v. Rothman, 492 F.2d 1260 (9th Cir. 1973) 10, 12

United States v. Schleis, 582 F.2d 1166 (8th Cir. 1978) 6, 7

United States v. Stevie, 582 F.2d 1175 (8th Cir. 1978) 7

United States v. Stewart, 591 F.2d 63 (9th Cir. 1979) 5, 11, 12

United States v. Wright, 577 F.2d 378 (6th Cir. 1978) 12

In the Supreme Court of the United States

OCTOBER TERM, 1978

No.

RICHARD J. VAUGHN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Richard J. Vaughn, defendant-appellant in the court below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on April 20, 1979.

OPINIONS BELOW

The final order and opinion of the Ninth Circuit on rehearing is unreported and is printed in Appendix 1. (App. at 1-2.) The original opinion of the Ninth Circuit is unreported and is printed in Appendix 2. (App. at 3-9.) The order of the District Court for the District of Arizona on defendant's motions to suppress is unreported and is printed in Appendix 3. (App. at 10.)

JURISDICTION

The original order and judgment of the Ninth Circuit were entered on June 9, 1978. The order of the Ninth Circuit granting the government's petition for rehearing was entered on December 8, 1978. The order and judgment of the Ninth Circuit on rehearing were entered on April 20, 1979, and the judgment became final on that date. This petition for certiorari was filed within 30 days of that date.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether this Court's ruling in *United States* v. *Chadwick,* 433 U.S. 1 (1977), invalidating the warrantless search of locked luggage seized incident to arrest, should be applied "retroactively" to searches conducted before the date of that decision.

2. Whether a Supreme Court search and seizure decision should be denied retroactive application where (a) a division of lower court authority existed regarding the validity of the type of search prior to the Supreme Court decision, and (b) where the circumstances of a search demonstrate that the police did not place good faith reliance on prevailing constitutional norm in conducting the search.

RELEVANT STATUTORY PROVISIONS

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

Petitioner was convicted on January 17, 1977, after a bench trial in the United States District Court, District of Arizona, of possession with intent to distribute a controlled substance (LSD) in violation of 21 U.S.C. §841(a)(1) and (b). Prior to trial, petitioner filed a motion to suppress as evidence the contents of a suitcase searched by police subsequent to petitioner's arrest on September 30, 1976. The district court denied the motion to suppress. (App. at 10.)

At the hearing on the motion to suppress, testimony revealed that petitioner and another person were arrested by police while alighting from an automobile near the Phoenix Sky Harbor International Airport. The arrest was based on information supplied by a ticket agent at the airport that petitioner had left the airport with a suitcase containing contraband. (Trans. at 18-22.) [1] Petitioner was not in possession of a suitcase at the time of his arrest. (Trans. at 23-24.) Following petitioner's arrest, police brought him to the security room at the airport for questioning. (Trans. at 23.)

Approximately one hour after petitioner had been taken into custody, police took possession of a locked suitcase which they discovered sitting next to a vehicle in the airport parking lot and brought it to the security room where petitioner was being held. (Trans. at 32.) After concluding that the suitcase was petitioner's, and after summoning a trained police dog to sniff it for drugs, police opened it and discovered contraband. (Trans. at 38-50.) The policeman conducting the search testified at the hearing on the motion to suppress that he felt justified in searching the suitcase

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[1] References are to the reporter's transcript of proceedings in the district court on petitioner's motion to suppress, held on December 20, 1976.

without a warrant because petitioner's flight to Chicago was scheduled to depart in a few minutes. (Trans. at 49.) The suitcase was not checked on the flight, however, and defendant was still under arrest at the time.

Petitioner appealed his conviction, alleging, *inter alia*, that the district court's denial of his motion to suppress was error. The Ninth Circuit in its initial opinion entered on June 9, 1978, reversed the district court's denial of petitioner's motion to suppress, relying on this Court's decision in *United States* v. *Chadwick*, 433 U.S. 1 (1977), which invalidated the warrantless search of locked luggage seized incident to arrest. The Ninth Circuit ordered the case remanded to the district court for findings on the issue of whether petitioner had abandoned the suitcase. (App. at 5-6.)

The government petitioned for rehearing, arguing that *Chadwick* should not be applied retroactively. In its opinion on rehearing, the Ninth Circuit agreed and affirmed petitioner's conviction. (App. at 1-2.)

REASONS FOR GRANTING THE WRIT

I.

THERE IS A CONFLICT AMONG THE CIRCUITS AND AMONG STATE COURTS AS TO WHETHER CHADWICK SHOULD BE APPLIED "RETROACTIVELY" TO SEARCHES OCCURRING PRIOR TO THE DATE OF THAT DECISION.

In *United States* v. *Chadwick*, 433 U.S. 1 (1977), this Court held that the warrantless stationhouse search of a footlocker, seized from defendants at the time of their arrest and thereafter under police control, could not be justified based on exigent circumstances or as incident to arrest. Since *Chadwick*, Courts of Appeal have disagreed on the question of *Chadwick's* "retroactive" application to cases involving searches conducted prior to the date of the *Chadwick* decision.

The Ninth Circuit panel in this case held that *Chadwick* would invalidate the search of defendant's suitcase, but that *Chadwick* should not be retroactively applied, relying on an earlier Ninth Circuit opinion in *United States* v. *Stewart*, 591 F.2d 63 (9th Cir. 1979) holding *Chadwick* nonretroactive. Panels of the Second, Fifth, and Seventh Circuits have likewise concluded that *Chadwick* should not be retroactively applied. *United States* v. *Reda*, 563 F.2d 510 (2d Cir. 1977), *cert. denied*, 435 U.S. 973 (1978); *United States* v. *Montgomery*, 558 F.2d 311 (5th Cir. 1977); *United States* v. *Berry*, 571 F.2d 2 (7th Cir. 1978), *cert. denied*, ... U.S. ....., 99 S.Ct. 129 (1978). Most of these courts have placed great emphasis on the language of *United States* v. *Peltier*, 422 U.S. 531 (1975), that good faith reliance by the police on prevailing constitutional norms in existence

at the time of a search justifies a denial of retroactivity in the context of the exclusionary rule, and have concluded that *Chadwick* changed prevailing law under that standard so as to warrant a denial of its retroactive application.[2]

These decisions denying retroactivity to *Chadwick* are in direct conflict with at least one other circuit—the Eighth—which has squarely held *en banc* that *Chadwick is* retroactive. *United States* v. *Schleis*, 582 F.2d 1166, 1173-74 (8th Cir. 1978) (*en banc*), *on remand for further consideration in light of Chadwick*, 433 U.S. 905 (1977).[3] In *Schleis*, the Eighth Circuit, after carefully considering the issue at length, held that "*Chadwick* presents no question of retroactivity because . . . we do not regard *Chadwick* as representing a departure from the Supreme Court's long-standing approach to the Fourth Amendment." 582 F.2d at 1173. The court stated that:

> "*Chadwick* announces no new constitutional doctrine, nor does it broaden any existing exclusionary rule. All the Court did in *Chadwick* was to hold that warrantless searches of luggage absent an exigency are an invasion of a 'legitimate privacy interest' and cannot be justified under any of the long established exceptions to the Fourth Amendment warrant requirement. In so holding, the Court stressed that 'in this area we do not write on a clean slate.' . . ." 582 F.2d at 1174.

[2] Even within these circuits, however, a divergence of opinion exists. In the recent decision of *United States* v. *Ochs*, No. 78-1163 (2d Cir., Mar. 13, 1979), for example, another panel of the Second Circuit declined to rely on *United States* v. *Reda*, *supra*, and chose a "more satisfactory basis" for determining the appeal.

[3] This Court's own remand of *Schleis* "for further consideration in light of *Chadwick*" raises further doubt about those decisions refusing to apply *Chadwick* retroactively. As noted by the Eighth Circuit in *Schleis*, there would have been no reason for the remand if this Court intended *Chadwick* to have only prospective effect. 582 F.2d at 1173, n.6.

The Eighth Circuit quickly confirmed its holding in *Schleis* in *United States* v. *Stevie*, 582 F.2d 1175, 1178 n. 1 (8th Cir. 1978) (*en banc*).

Other circuit courts, the First, Third, Sixth, and D.C. Circuits, although not yet squarely addressing the retroactivity issue, have assumed without question *Chadwick's* applicability to searches antedating that decision by applying or distinguishing *Chadwick* in pre-*Chadwick* search cases. *See United States* v. *Miller*, 589 F.2d 1117, 1130 (1st Cir. 1978); *United States* v. *Foster*, 584 F.2d 997, 1002 (D.C.Cir. 1978), *cert. denied*, ... U.S. ....., 99 S.Ct. 620 (1978); *United States* v. *Diggs*, 569 F.2d 1264, 1265 (3d Cir. 1977); *Bradley* v. *Cowan*, 561 F.2d 1213, 1215 (6th Cir. 1977).

The lack of specific Supreme Court guidance on *Chadwick's* retroactivity, and the absence of federal court uniformity on that issue, is also resulting in divergent state court rulings. *Compare Shingleton* v. *State*, 39 Md. App. 527, 387 A.2d 1134, 1141 n.6 (1978) and *State* v. *Kaiser*, 91 N.M. 611, 577 P.2d 1257, 1260-61 (Ct. App. 1978) (expressly holding *Chadwick* retroactive), *with State* v. *Conti*, 573 S.W.2d 95, 100-01 (Mo. App. 1978) (expressly holding *Chadwick* non-retroactive). Other state courts, like some federal Circuit Courts, have applied *Chadwick* without question to searches conducted prior to the date of the *Chadwick* decision. *Sanders* v. *State*, 262 Ark. 595, 559 S.W.2d 704, 706 (1977), *cert. granted sub nom. Arkansas* v. *Sanders*, ... U.S. ..... (1978) (No. 77-1497), argued Feb. 27, 1979;[4] *People* v. *Hamilton*,

[4] The treatment given the *Sanders* case thus far by this Court again casts doubt on those decisions refusing to apply *Chadwick* retroactively. This Court apparently granted certiorari in *Sanders* to determine whether *Chadwick* invalidates a warrantless search of luggage taken from inside an automobile, even though the search in that case occurred prior to *Chadwick*.

74 Ill.2d 457, 468-70, 386 N.E. 2d 53, 58 (1979), *aff'g*, 56 Ill. App.3d 196, 371 N.E.2d 1234, 1238-39 (1978); *People* v. *Crawl*, 401 Mich. 1, 257 N.W.2d 86, 96-97 (1977); *Rodriquez* v. *State*, 91 N.M. 700, 580 P.2d 126, 131 (1978). *See also State* v. *Dean*, 2 Kan.App. 2d 64, 574 P.2d 572, 574-75 (1978); *State* v. *Parker*, 153 N.J.Super. 481, 380 A.2d 291, 294-95 (1977). *Compare State* v. *Walker*, 119 Ariz. 121, 579 P.2d 1091, 1098 (1978); *People* v. *DeSantis*, 46 N.Y. 2d 82, 412 N.Y.S.2d 838, 840-42 (1978).

The lack of judicial consistency regarding the issue of *Chadwick's* retroactivity has resulted in an unequal and discriminatory application of the law. This Court should therefore provide specific guidance to both federal and state courts on the issue by resolving it squarely.

II.

THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING THE RETROACTIVE APPLICATION OF ALL FUTURE SUPREME COURT SEARCH AND SEIZURE DECISIONS.

1. The decision below, and the decisions on which it relies, sanction police reliance on aberrant judicial authority in conducting searches, and result in a bar to retroactive application of any new Supreme Court search and seizure decision.

Most of those decisions denying retroactivity to *Chadwick* purport to apply the reasoning of *United States* v. *Peltier*, 422 U.S. 531 (1975). In *Peltier*, this Court denied retroactive application to its ruling in *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973), that warrantless roving border patrol searches were unconstitutional. The *Peltier* majority indicated that since law enforcement officers "reasonably

believed in good faith" that the warrantless roving border patrol search in that case was lawful based on the "prevailing constitutional norm" in existence at the time the search was conducted, the later holding of *Almeida-Sanchez* would not be applied retroactively. 422 U.S. at 536, 537, 542.

The prevailing norm relied upon in good faith by the police in *Peltier* was clear and was emphasized by this Court. It was stressed in *Peltier* that the very type of search condemned in *Almeida-Sanchez* had been *repeatedly* and *consistently* approved by the judiciary. 422 U.S. at 540-41.[5] Moreover, such searches had been conducted in reliance upon a validly enacted federal statute, supported by long-standing administrative regulations. 422 U.S. at 539-41. It was that type of uniform precedent in *Peltier* which justified a finding of good faith compliance by police with then-existing standards.

Those courts declining to apply *Chadwick* retroactively ignore the need for such uniform precedent in demonstrating police good faith in conducting a search. Warrantless luggage searches removed in time and space from arrest, particularly of the type involved in this case, were hardly the subject of the same uniform and consistent judicial approval prior to *Chadwick*. *See, e.g.*,

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[5] Likewise, in *Bowen* v. *United States*, 422 U.S. 916 (1975), this Court, applying *Peltier* to deny retroactivity to its decision in *United States* v. *Ortiz*, 422 U.S. 891 (1975), holding warrantless fixed checkpoint border searches without probable cause invalid, found that *all* the Courts of Appeal in circuits adjacent to the Mexican border had upheld such searches, and no contrary precedent was reported. 422 U.S. at 918-19. In this regard *Peltier* and *Bowen* did not deviate markedly from earlier Supreme Court retroactivity analysis, since in most every instance where this Court has refused to apply a new criminal procedure decision retroactively that decision similarly created "new law" very emphatically. See *United States* v. *Peltier*, *supra* at 547, n.5 (Brennan, J. dissenting).

United States v. *Martin*, 562 F.2d 673 (D.C.Cir. 1977); *United States* v. *Lonabaugh*, 494 F.2d 1257, 1259-60 (5th Cir. 1973); *United States* v. *Garay*, 477 F.2d 1306 (5th Cir. 1973); *United States* v. *Colbert*, 454 F.2d 801 (5th Cir. 1972), *rev'd en banc on other grounds*, 474 F.2d 174 (1973); *see also United States* v. *Rothman*, 492 F.2d 1260 (9th Cir. 1973).[6] Indeed, both the district and Circuit Courts in *Chadwick* itself had invalidated the suitcase search before this Court affirmed that ruling. *United States* v. *Chadwick*, 393 F.Supp. 763 (D.Mass. 1975), *aff'd* 532 F.2d 773 (1st Cir. 1976). This is hardly indicative of repeated and consistent authority for conducting warrantless suitcase searches prior to *Chadwick*.

What is at best a split of lower court authority should not justify non-retroactive application of a Supreme Court opinion approving of the better reasoned cases. Moreover, by focusing only on those decisions arguably justifying warrantless suitcase searches prior to *Chadwick*, and ignoring contrary precedent, those courts denying retroactivity to *Chadwick* seem to justify a finding of police good faith reliance on prevailing constitutional norm whenever the government can point to any judicial decision, no matter how aberrant or poorly reasoned, which might sustain the search. Such an analysis hardly motivates police to be less than creative in conducting searches, and reduces their sensitivity to Fourth Amendment rights to the lowest common denominator.

If *Chadwick* is denied retroactive application based on the *Peltier* standards, it is difficult to imagine any Supreme

[6] The Ninth Circuit in this case cited *United States* v. *Mehciz*, 437 F.2d 145 (9th Cir. 1971), as authority for the search. *Mehciz*, involving the search of a suitcase which defendant was carrying at the time of his arrest, does not provide justification for a search of personal effects not in a person's custody at the time of his arrest—as in this case. *See* Part III, *infra*.

Court search and seizure decision that would be retroactive. Since this Court rarely decides cases unless there is some authority on both sides of an issue presented, *Peltier* would in effect stand for an automatic rule against retroactivity in exclusionary rule cases. Unless this Court is willing to acquiesce in such a *per se* rule, it must provide guidance to lower courts regarding the proper standards for evaluating the retroactive effect of future Supreme Court search and seizure decisions, and for evaluating police good faith compliance with then-prevailing constitutional norms under the *Peltier* analysis.

2. Based on the reasoning of decisions denying retroactivity to Chadwick, a Supreme Court decision may be retroactive in one circuit and not in another.

Apart from failing to appreciate the importance of the virtual unanimity of authority relied on in *Peltier*, those courts denying retroactivity to *Chadwick* have not only deemphasized available prior Supreme Court precedent as a means of gauging police good faith, but have emphasized only precedent in their own Courts of Appeal to the exclusion of other Courts of Appeal. *See United States* v. *Stewart*, *supra* at 66-67. If that type of analysis is justified, a Supreme Court decision may be retroactive in one circuit, but not in another. Certiorari should be granted to clarify that this Court by its opinion in *Peltier* did not intend such a result.

III.

DENIAL OF APPLICATION OF CHADWICK TO THE FACTS OF THIS CASE IS UNJUSTIFIED UNDER ANY STANDARD.

In applying the rule of non-retroactivity adopted by some other courts, the Ninth Circuit panel in this case

failed to focus on the circumstances of the particular search involved. The facts of this case in no way demonstrate good faith reliance by police on prevailing constitutional norm in conducting the search, even under the standards of those cases on which the court relied.

The defendant's suitcase here was *not* seized from his immediate possession at the time of arrest, arguably justifying a later warrantless search prior to *Chadwick* under an extension of the "search incident to arrest" standards. *Compare United States* v. *Berry, supra* at 3; *United States* v. *Reda, supra* at 511-12. Nor was it seized from or near an automobile in which petitioner was riding, arguably justifying a warrantless search under the "automobile search" line of cases. *Compare United States* v. *Montgomery, supra; United States* v. *Stewart, supra.* Rather the police took the locked suitcase from the airport parking lot, about an hour after petitioner was arrested, and brought it into the security room where he was being held. At that time they conducted a search of its contents without ever considering the need for a warrant. Such circumstances are hardly indicative of police good faith reliance on then-prevailing constitutional norms. *See, e.g., United States* v. *Wright,* 577 F.2d 378 (6th Cir. 1978); *United States* v. *Martin,* 562 F.2d 673, 678 (D.C.Cir. 1977); *United States* v. *Lonabaugh,* 494 F.2d 1257, 1259-60 (5th Cir. 1973); *United States* v. *Rothman,* 492 F.2d 1260 (9th Cir. 1973); *United States* v. *Garay,* 477 F.2d 1306 (5th Cir. 1973).

In addition, the searching officer's own testimony here belies his good faith reliance on existing constitutional principles in conducting the search. He expressly testified at the hearing on the motion to suppress that he proceeded with the search without first obtaining a warrant because petitioner's flight to Chicago was scheduled to depart in a few minutes. (Trans. at 49.) Since the defendant was

under arrest and would be going nowhere on any flight, and since the suitcase was not checked as baggage and was within police custody, this reason for proceeding with the search without first obtaining a warrant had no justification in fact or law. As a result, the police must clearly be "charged with knowledge that the search was unconstitutional under the Fourth Amendment." *United States* v. *Peltier, supra* at 542. The lower court's holding that the non-retroactivity of *Chadwick* to this "suitcase" search automatically justifies the police conduct ignores the facts of this case and judicial precedent regarding the type of search actually conducted here.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Ninth Circuit in this case.

Respectfully submitted,

JEROLD S. SOLOVY
JOSEPH G. BISCEGLIA

Attorneys for Petitioner
Richard J. Vaughn

Of Counsel:
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

May 21, 1979

APPENDIX

APPENDIX 1

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RICHARD J. VAUGHN,

Defendant-Appellant.

No. 77-1290

Appeal from the United States District Court
for the District of Arizona

Before: CHAMBERS, HUFSTEDLER, and GOODWIN, Circuit Judges.

ORDER AND MEMORANDUM ON REHEARING

After the issuance of our prior Memorandum, our court directly decided that *United States* v. *Chadwick* (1977) 433 U.S. 1, was not retroactive. (*United States* v. *Stewart* (9th Cir. 1979) ..... F.2d ..... [slip op'n Feb. 14, 1979, No. 78-1787].)

Accordingly, our judgment is vacated. Our prior memorandum disposition is amended by deleting our discussion of the motion to suppress the contraband found in Vaughn's suitcase. In the place of the deleted text, the court substitutes the following text:

Although *United States* v. *Mehciz* (9th Cir. 1971) 437 F.2d 145, was overruled by *United States* v. *Chadwick*, *supra*, *Mehciz* controls the disposition of this case because *Chadwick* is not retroactive. The district court therefore correctly ruled that Vaughn's motion to suppress should be denied.

The court further amends the prior disposition by striking the last sentence of the Memorandum and substituting in its place the word "AFFIRMED."

APPENDIX 2

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RICHARD J. VAUGHN,

Defendant-Appellant.

No. 77-1290

Appeal from the United States District Court
for the District of Arizona

Before: CHAMBERS and HUFSTEDLER, Circuit Judges, and WONG,* District Judge.

MEMORANDUM

On October 21, 1976, a complaint was filed against appellant charging him with possession with intent to distribute LSD, a violation of 21 U.S.C. § 841(a)(1). An indictment issued on November 17, 1976, charging him with this offense. Motions to suppress the physical evidence and the statements made by appellant were denied and, after a jury-waived trial, he was found guilty. Appellant appeals from a judgment of conviction. We reverse and remand.

* Honorable Dick Yin Wong, United States District Judge, District of Hawaii, sitting by designation.

On September 30, 1976, appellant Vaughn and another man approached the American Airlines ticket counter in the Phoenix airport. Their dress, payment in cash for first-class tickets, and mannerisms with respect to the delay of the flight struck the ticket agent as being unusual, and she asked appellant to open his suitcase. He did, and she proceeded to search it. In the course of her search, she discovered a powdery substance in packages. Upon this discovery, the agent summoned the police, and appellant took the suitcase and walked out of the terminal. When pursued, appellant, who had placed the suitcase on the sidewalk, began to run and got away in a car which pulled up. The car then turned into a parking lot and stopped, at which time appellant was arrested. He was taken back to the airport, and a search of the parking lot resulted in recovery of the suitcase. It was found upright, alongside a vehicle, with appellant's name tag on it.

When advised of his rights, appellant stated that he wanted to see an attorney. No questioning was pursued at that time. Later, another officer, who knew that appellant had requested an attorney, took appellant from the holding room and began to question him. During the questioning, appellant admitted that the suitcase was his.

During this time, a narcotics dog-handler was summoned to the airport. He arrived approximately two hours after appellant was arrested and directed the dog to the suitcase. When the dog "alerted" on the suitcase, an officer asked appellant for the combination to the lock. Appellant gave it to him, and the officer opened the suitcase and searched it.

At trial, appellant testified that he placed the suitcase on the sidewalk while waiting for the driver of the car to arrive. Since the pursuing officer was close to the suitcase,

he did not have time to pick it up before getting into the car. However, when he did not think he was being followed, he asked the driver to pull into the parking lot so that he could retrieve the suitcase on foot.

In denying the defendant's motion to suppress the evidence, the district court relied on *United States* v. *Mehciz*, 437 F.2d 145 (9th Cir.), *cert. denied*, 402 U.S. 974 (1971).

Physical Evidence

The first issue presented is whether the district court erred in denying the motion to suppress the physical evidence. Appellant breaks this issue down into two sub-issues, which are: (1) Was the district court's reliance on *Mehciz* misplaced? and (2) Was the warrantless search justified on the theory of abandonment?

With respect to the first sub-issue, it appears that the district court properly relied on *Mehciz*. *Mehciz*, however, was thereafter effectively overruled by *United States* v. *Chadwick*, ... U.S. ..... S.Ct. 2476 (1977). In that case, the Court affirmed the district court's suppression of evidence obtained as the result of a warrantless search of a footlocker. At the time of the arrest, the police had probable cause to believe that the footlocker contained marijuana. However, they did not obtain a search warrant. About one and a half hours after the arrest, they opened the locker and searched it, having either obtained the keys from defendant or used other means. The district court granted defendant's motion to suppress the evidence obtained as a result of the search, and the First Circuit affirmed. The Supreme Court granted certiorari and affirmed. The Court stated that

> Unlike an automobile, whose primary function is transportation, luggage is intended as a repository of per-

> sonal effects. In sum, a person's expectations of privacy in personal luggage are substantially greater than in an automobile.
>
> Nor does the footlocker's mobility justify dispensing with the added protections of the Warrant Clause. Once the federal agents had seized it at the railroad station and had safely transferred it to the Boston federal building under their exclusive control, there was not the slightest danger that the footlocker or its contents could have been removed before a valid search warrant could be obtained. . . . With the footlocker safely immobilized, it was unreasonable to undertake the additional and greater intrusion of a search without a warrant.

Slip Op. at 11-12, 97 S.Ct. at 2484-85.

As to the second sub-issue, the Government asserts that the appellant abandoned the suitcase in the parking lot and that therefore under *Hester* v. *United States*, 265 U.S. 57 (1924), there was no seizure within the meaning of the Fourth Amendment. There is no indication that the district court dealt with this issue, although it was raised by the Government. The sole basis for the denial of the motion to suppress was the reliance by the court on *Mehciz*. Record at 55. This matter should therefore be remanded to the trial court for its determination as to whether or not the suitcase was abandoned. If the suitcase were abandoned, the court could properly deny the motion to suppress the contraband seized. Otherwise, the motion should have been granted.

Statements

Appellant argues that his statements made to the police should have been suppressed because the officers failed to

comply with his request for counsel. It is clear that the government has a heavy burden in proving that a defendant has waived counsel voluntarily and intelligently. *United States* v. *Rodriguez-Gastelum*, ... F.2d ..... (9th Cir. Jan. 30, 1978). But in this appeal, as in all others, the district court's findings on matters of credibility are binding on us, and we must read this record, as we read others, giving the appellee the benefit of all the traditional presumptions. In our view, the record does not support a reversal on this issue.

Shortly after his arrest, Vaughn was told his rights by an officer of the Phoenix Police Department. Vaughn responded that he understood his rights and he wished the assistance of counsel. Vaughn stated that he knew a lawyer in Chicago whom he would contact, but that he knew none in Phoenix. He said nothing about being financially unable to retain a lawyer. On the contrary, his conversation was in the context of knowing a private lawyer in Chicago whom he would contact.

The officer testified that he told Vaughn that he might call an attorney if he wished, and he offered Vaughn the telephone yellow pages, but Vaughn declined them. He also testified that he could not personally recommend an attorney to Vaughn. Again this indicates that neither Vaughn nor the officer considered that Vaughn wished, or was financially qualified to have, an attorney appointed to represent him. Their conversation occurred in the airport security room, and the officer testified that telephones were available for Vaughn's use. He also testified that no telephones were located at the holding tank, but this does not mean that none were available nearby for his use. The record shows that appellant never asked to use a telephone, either when he was in the security room or during the short

period he was in the holding tank following his conversation.[1]

About a quarter or a half hour later, a second officer arrived at the airport and was asked to assist in the investigation, which now included four persons in custody: Vaughn, the driver of the car, and two people who had accompanied Vaughn to the airline ticket counter. The second officer was told that Vaughn had indicated that he wished to be represented by counsel. He had Vaughn brought from the holding tank and asked him if he understood his rights. Again Vaughn stated that he did. He told Vaughn that he would like to question him and asked if Vaughn wished to have an attorney present. Vaughn said, "No," and indicated that he would refuse to answer any questions that he considered might be incriminating.

At the hearing, Vaughn was asked why he had elected to be questioned. He replied, "Because I didn't think they were incriminating questions. I didn't know the procedure." The district judge asked him if he understood when he made the election that he did not have to say anything. He replied, "Yes, I did."

Rodriguez-Gastelum holds that an officer is not prohibited from initiating a discussion that leads to a waiver after the defendant has indicated his wish for assistance of counsel. There must, of course, be no badgering, or coercion, or pressure by the officer. But this record discloses none. Vaughn knew that he could remain silent, and

[1] Vaughn never testified that he asked for a telephone or that he wanted to use a telephone. He testified that no effort was made to contact the Chicago attorney, saying, "I was never asked about it again, never asked me if I wanted to make a phone call. I just never, you know, was given an opportunity to."

he deliberately chose to answer questions without an attorney present. His choice to waive his right to counsel was a knowing and intelligent one.

Reversed and remanded for proceedings consistent with this memorandum.

APPENDIX 3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Date: December 21, 1976

UNITED STATES OF AMERICA,

Plaintiff,

vs. No. CR-76-437 Phx.

RICHARD J. VAUGHN,

Defendant.

Defendant filed motions to suppress statements and physical evidence urging Miranda and search and seizure violations. An evidentiary hearing was held. From the testimony at the hearing, including the testimony of defendant, it appears that there is no substantial dispute as to the material facts so findings of fact are not necessary.

IT IS ORDERED:

1. The motion to suppress statements is denied.
   United States v. *Davis*, 527 F.2nd 1110 (9th CA 1975) *cert denied* 96 S. Ct. 1729
   United States v. *Pheaster* ..... F.2nd ..... (9th CA 1976) #75-1004 and 74-3308

2. The motion to suppress physical evidence is denied.
   United States v. *Mcheiz* 437 F.2nd 145 (9th CA 1971) *cert denied* 402 U.S. 974

cc mailed to:
M. Scott
T. Thinnes

Wm. P. Copple
Wm. P. Copple
United States District Judge